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No. _____

In The Supreme Court Of The United States

OCTOBER TERM 1996

JIMMIE ROSS BLALOCK;
LEE ROY BLALOCK, JR.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Petitioner Lee Roy Blalock should be held accountable, under the theory of accomplice attribution, for amounts of drugs prior to his entry into and beyond the scope of his role in the conspiracy, particularly in light of a finding of "minor participant" and the Trial Court's conclusion of his lesser culpability?

Whether the Petitioners should receive an enhancement under U.S.S.G. Section 2D1.1 for possession of firearms by co-conspirators when said possession was not reasonably foreseeable to them.

LIST OF PARTIES TO PROCEEDING

United States of America (Respondent)

Jimmie Ross Blalock

Lee Roy Blalock (Petitioners)

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The opinion of the United States Court of Appeals for the Fourth Circuit, for which review is sought, in United States v. Jimmie Ross Blalock, No. 95-5280, and United States v. Lee Roy Blalock, No. 95-5295 (4th Cir. May 20, 1996) (per curiam) (unpublished). The opinion of the United States Court of Appeals for the Fourth Circuit is reproduced in the Appendix of this petition. The Order on Petition For Rehearing with Suggestion For Rehearing En Banc was entered on June 19, 1996 and is also reproduced in the Appendix.

JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 20, 1996. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

REFERENCES TO PRIOR OPINIONS/DECISIONS

United States v. Jimmie Ross Blalock, No. 95-5280

United States v. Lee Roy Blalock, No. 95-5295
(4th Cir., May 20, 1996)(per curiam)(unpublished)

In The
Supreme Court of the United States

JIMMIE ROSS BLALOCK and
LEE ROY BLALOCK, JR.
Petitioners

v.

UNITED STATES OF AMERICA
Respondent

Petition for Writ of Certiorari from
the United States Court of Appeals
for the Fourth Circuit

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered in their cases on May 20, 1996.

STATEMENT OF THE CASE

On June 1, 1994, a Federal grand jury for the Middle District of North Carolina returned a one-count indictment against the defendants Jimmie Ross Blalock, Lee Roy Blalock, Jr., and one unnamed individual.

Count One of the indictment alleged a conspiracy to possess and to distribute in excess of 1,000 kilograms of marijuana, in violation of Title 21, United States Code, Sections 846 and 841 (b)(1)(b). On October 3, 1994, the matter came on for trial before a jury. The jury returned a verdict of guilty as to both defendants on October 11, 1994.

A sentencing hearing was held on March 28, 1995. The defendant Jimmie Ross Blalock, by judgment signed on April 5, 1995, was sentenced to a term of 200 months. The defendant Lee Roy Blalock, Jr., found to be only a minor participant, was sentenced to a term of 160 months. Timely Notice of Appeal was given by the defendants on April 12, 1995 and April 17, 1995. Petitioners' convictions were affirmed by the Fourth Circuit on May 20, 1996. A Petition for Rehearing with Suggestion For Rehearing En Banc was denied by Order on June 19, 1996.

FACTUAL BACKGROUND

This case arose as of a raid by law enforcement in February of 1990 at property owned by Adam Blalock, the brother of Petitioners. The raid was part and parcel of an extensive investigation by the IRS, ATF, and local law enforcement of a marijuana smuggling ring which utilized compartments on tractor trailers to bring marijuana together with regular produce into North Carolina from Mexico, The ring was headed by Adam Blalock and Pam Beauchamp who both remain fugitives.

Lee Roy Blalock operated for many years a legitimate produce business at Forest Hills Curb Market in Winston-Salem, North Carolina. His involvement, if it existed at all prior to the February, 1990 raid, was very minimal insofar as it related to his brother's smuggling operation. There was testimony at trial that Jimmie Blalock made direct sales to both Dennis Gale and Elmer Hanes. No one testified to any sales ever made by Lee Roy Blalock. Additionally, no one testified to ever seeing Lee Roy Blalock unload marijuana from trucks, although the trial court mistakenly attributed those actions of Jimmie Blalock to Lee Roy Blalock.

Lee Roy Blalock's involvement began when apparently he attempted to recover or preserve some funds belonging to his brother Adam. Later activity of Lee Roy included digging up money belonging to Adam although this occurred more than a year after the raid and Adam Blalock's disappearance.

No credible evidence existed as to Lee Roy Blalock that could conceivably support the conclusion that he was a member of the conspiracy from the outset, and, further, that he agreed to the actions of his co-conspirators. Lee Roy Blalock was a "late-entry" into drug smuggling ring that had, in effect, disbanded with Adam Blalock's disappearance. True, he

apparently tried to salvage and secrete his brother's ill-gotten gains. It is submitted that those actions did not make him a full-scale member of a conspiracy that had basically terminated before his entry.

The jury, after a week plus trial featuring testimony regarding several different Blalock's, found both defendants guilty as charged.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit has affirmed the District Court by holding, inter alia, that the District Court properly found the scope of both Petitioners' jointly undertaken activity and correctly attributed amounts, up to almost the entire amounts involved in the conspiracy, to both Petitioners, as reasonably foreseeable to them. Lee Roy Blalock, however, was found to be only a minor participant and it is vigorously disputed that the scope of his undertaking came anywhere close to the amounts attributed to him. Petitioner Lee Roy Blalock respectfully suggests that the amounts attributed to him resulted more as a result of his surname than as a result of any proper inquiry into the scope of his agreement. Both Petitioners also resist their enhancement for possession of firearms by their fugitive brother, Adam Blalock, in the absence of reasonable foreseeability to either of them.

In deciding the case as it has, the Fourth Circuit has issued an opinion that is in conflict with its own circuit precedent, the prevailing case law of other circuits, and of this Court. Consequently, this Court should grant this Petition for Writ of Certiorari and the Petitioners sentences should be vacated and remanded for proper analysis of amounts attributable and without the enhancement for possession of firearms.

ARGUMENT

THE COURT INCORRECTLY UPHELD THE TRIAL COURT'S ATTRIBUTION OF AMOUNTS AS NOT CLEARLY ERRONEOUS WHEN THE TRIAL COURT FAILED TO PROPERLY MAKE THE TEMPORAL

PRIMACY DETERMINATION OF JOINTLY UNDERTAKEN ACTIVITY WITHIN THE SCOPE OF EACH PETITIONER'S AGREEMENT

As stated in United States v. Sepulveda 15 F.3d 1161, 1197 (1st Cir. 1993):

> ...[I]n the context of jointly undertaken criminal activity, such as a conspiracy, a defendant is not automatically saddled with the full weight of the conspiracy's wrongdoing; rather, a defendant is responsible for drugs he personally handled or anticipated handling, and, under the relevant conduct rubric, for drugs involved in additional acts that were reasonably foreseeable by him and were committed in furtherance of the conspiracy (citations omitted).... 'the measure of a defendant's accountability for drug transactions in which he was not personally involved is usually congruent with the scope of his agreement with the other participants in the criminal enterprise.'

Not only were the amounts attributed to Lee Roy Blalock clearly beyond the scope of any agreement on his part, the amounts were prior to a time when any evidence of substance existed at all to infer an agreement on his behalf. Lee Roy Blalock's activities occurred post-February, 1990, the time of the law enforcement raid on Adam Blalock's property. It is also submitted that the trial court abused its discretion and the Court of Appeals erroneously affirmed that ruling in regard to the admission of the testimony concerning the significance of the entry of the initial "P" in a ledger, pursuant to 801 (d)(2)(E). Said hearsay statement was admitted without sufficient prior independent evidence of Lee Roy Blalock's participation in the conspiracy, and it was a casual remark, not in furtherance of the conspiracy. The attribution of amounts

to Lee Roy Blalock, prior to the February, 1990 raid, were prior to any evidence of his involvement and thus in conflict with the holding of United States v. Matthews, 942 F.d. 779 (10th Cir. 1991).

It is submitted that Lee Roy Blalock's involvement was peripheral even after February, 1990. His actions were those of a brother, trying to salvage the situation and distress his family had been placed in by the actions of his fugitive brother, Adam Blalock. The trial court found Lee Roy Blalock to be a minor participant; it would necessarily follow that this reduced involvement in the conspiracy should limit, in some degree, the attribution of amounts to him. The Court, however, assigned virtually all of the conspiracy's actions to him in sentencing. As a result, a late-entering, minor participant took the brunt of the conspiracy's actions. In United States v. Collado, 975 F.d. 985 (3rd Cir. 1992), similar situations were addressed. That case held, inter alia, that whether an individual defendant could be held accountable for amounts of drugs involved in reasonably foreseeable transactions conducted by co-conspirators depended on the degree of a defendant's involvement in that conspiracy. Secondly, in absence of unusual circumstances, conduct that occurred prior to a defendant's entry into an agreement could plainly not be within the scope of that agreement so as to be attributable to that defendant. Collado, (Id.), spoke of the danger of all defendants being sentenced on the basis of the conduct charged in the offense of conviction, with the likely result that the conspirator who directed and controlled the operation would be treated the same as a lesser participant. Sentencing Courts must distinguish between co-conspirators for the purposes of accomplice attribution. As stated in Collado (Id.) At page 992:

> The relevant conduct provisions therefore recognize that, while it is appropriate to hold a defendant who

> exhibits a substantial degree of involvement in the conspiracy accountable for reasonably foreseeable acts committed by a co-conspirator, the same cannot be said for a defendant whose involvement was much more limited.

Both United States v. Evbuomwan, 992 F.d. 70 (5th Cir. 1993) and United States v. Jenkins, 4 f.3d 1338 (6th Cir. 1993), stress the "temporal primary" of the trial court's scope analysis in conjunction with foreseeability and attribution of amounts. Jenkins, Id., held that a co-conspirator is not necessarily liable for the total amount of drugs, even if the same were foreseeable to him, if they were not within the scope of his jointly undertaken activity. The government conceded in Jenkins (as they did as to Lee Roy Blalock), that a defendant was not a major player and that he probably did not possess the same knowledge of the overall conspiracy as the other defendants. In derogation of that concession, the government then still tried to hold him accountable for the majority of drugs attributed to the overall conspiracy. The Court remanded for re-sentencing, stressing that another limitation (besides foreseeability) to a court's ability to charge a defendant with the conduct of others is that the conduct must be in the furtherance of the execution of the jointly undertaken criminal activity. Likewise, Evbuomwan (supra) held that it was of no moment if criminal acts are foreseeable if there is not first a showing that jointly undertaken criminal activity has taken place. As stated at page 74:

> If the defendant has not joined the criminal activity, it does not matter that he could have foreseen the criminal act. The reasonably foreseeable standard applies only after it is shown that a jointly undertaken activity has taken place.

Throughout the entirety of these proceedings, Lee Roy Blalock has suffered as a result of his relationship to his fugitive brother, Adam Blalock, and the apparent "lumping together" of acts committed by anyone with the surname Blalock. While Jimmie Ross Blalock maintains that the amounts attributed to him did not have a sufficient or substantial factual underpinning, it is clear, as voiced by both the trial court and the prosecutor, that Lee Roy Blalock is appreciably less culpable than the other co-conspirators. It is also clear that Adam Blalock, Pam Beauchamp, and others ran this organization; Jimmie Ross Blalock and Lee Roy Blalock are now unjustly paying for it. In United States v. Smith, 26 f.3d 739 (7th Cir. 1994), one defendant became his brother's keeper until rescued by the appellate court. In that case, the Seventh Circuit remanded for re-sentencing the case of Kenneth Collins because of "two defendant's named Collin's plus two tapes of drug transactions, mixed into fifteen days of testimony...". The Court stated that the evidence relative to Kenneth Collins showed a lesser degree of knowledge as to the conspiracy than that of his brother. It is therefore simplistic to state, yet nevertheless valid, that, even though defendants are brothers, the same searching analysis needs to be applied to each of them as to any other co-conspirators.

The case against Lee Roy Blalock, while being a monument to innuendo in a substantive sense, clearly needs re-examination as to attribution of amounts. The case against Jimmie Ross Blalock suffers from many of the same infirmities and should be remanded for sentencing based upon his jointly undertaken activity and not that of his fugitive brother, Adam Blalock.

A possible explanation for the trial Court's erroneous attribution of amounts to Lee Roy Blalock occurs because of the court's apparent confusion regarding the two charged brothers during sentencing when it erroneously asserted that

Lee Roy Blalock was present at a marijuana unloading and that he was heavily involved in moving two tractor loads of marijuana. The Court misinterpolated the names of the brothers and the applicability of this evidence as to each defendant. Although this error was briefed and argued in the Fourth Circuit with specific reference to pages 963-964 of the Joint Appendix, it was not addressed by the Fourth Circuit's Opinion.

THE FOURTH CIRCUIT ERRONEOUSLY UPHELD THE TRIAL COURT'S FIREARMS ENHANCEMENT AS TO BOTH PETITIONERS, PARTICULARLY IN LIGHT OF THE POSSESSION OF SAME BY A FUGITIVE CO-CONSPIRATOR PRIOR TO PETITIONER LEE ROY BLALOCK'S ENTRY INTO THE CONSPIRACY.

It is submitted that the application of the U.S.S.G. Section 2 D1.1 (b)(1) enhancement as a result of weapons found on Adam Blalock's property during the raid of February, 1990 factually extends the scope of Circuit precedent in United States v. Kimberlin, 18 F.3d 1156 (4th Cir. 1994), and conflicts with the holdings of United States v. Cochran, 14 F.3d 1128 (6th Cir. 1994), and United States v. Ramos, 1995 WL 755828 (5th Cir. Dec. 20, 1995).

In Cochran the Court found that there was no objective evidence that the defendant knew that a weapon was present or that it was reasonably probable that his co-conspirator would be armed. The Court stated that it was not willing to indulge in "the fiction that a firearm's presence will always be foreseeable to persons participating in illegal drug transactions"; mere presence plus association with illegal possessors is not enough to establish possession; no objective evidence showed that the defendant knew the weapon was present or that he knew it was reasonably probable that his co-conspirator would be armed.

Ramos, supra, found an insufficient nexus as to one defendant relative to firearms found in a house utilized by co-conspirators to store drugs. In that case, it was held that even though the use of firearms was a significant aspect of the drug conspiracy, that fact alone was insufficient to justify the enhancement. Further, since there was no evidence that he witnessed any other member of the conspiracy using or even carrying a firearm, it could not be concluded that he could reasonably foresee their use.

Kimberlin, supra, stands for the proposition that, absent evidence of special circumstances, it is then fairly inferable that a co-defendant's possession of a dangerous weapon is foreseeable to a defendant with reason to believe that his collaborative criminal venture involves an exchange of controlled substances for a large amount of cash. Petitioner Lee Roy Blalock's situation is one of exceptional circumstances precluding the ordinary application of the principals espoused in Kimberlin. The dearth of evidence implicating intimate involvement in the overall conspiracy as it relates to both Petitioners impacts on the proper range of foreseeability that should have been utilized by the District Court.

In closing, Petitioners reiterate the thought expressed in many conspiracy opinions. Conspiracy cases often present, from an evidentiary standpoint "murky proposition." cf. United States v. Giunta, 925 F.2d 758 at 765 (4th Cir. 1991). In the words of Judge Phillips... "the danger of guilt being found on the basis of speculation from mere association between criminally disposed people, related criminal behavior, and like considerations, is acute. Id. The opinion continues:

> There is no special, more stringent standard in conspiracy. What is appropriate, however, is the recognition, carrying forward Justice Jackson's in

> Krulewitch, that the very 'elasticity' of the conspiracy concept may and frequently does tend to produce more 'slippery' facts in proof than do prosecutions for less 'elastic' substantive offenses, with a corresponding greater danger that speculation rather than reason may be required to make the necessary leaps of inferences to find guilt. Heightened vigilance to guard against the increased risk of speculation, though not a heightened standard, is warranted in conspiracy prosecutions Id. at 766.

The dangers warned of in conspiracy prosecutions apply equally to attribution of amounts for sentencing in conspiracy cases. Since drug cases are "quantity-driven", this Court should exercise its supervisory authority to emphasize that these sentences must be individualized; it is a manifest injustice when a "bit" player in a conspiracy case is sentenced and imprisoned for a lengthy term based largely on the actions of others that the government did not prove that he was in agreement with. Haphazard inferences should not deprive persons of their liberty.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant this Petition for writ of Certiorari and reverse the decision of the United States court of Appeals for the Fourth Circuit affirming the Petitioners' convictions and sentences.

This the 12 day of September, 1996.

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APPENDIX

APPENDIX

United States v. Jimmie Ross Blalock and Lee Roy Blalock, Jr.
Nos. 95-5280, 95-5295
(4th Cir. May 20, 1996) (per curiam) (unpublished) App. A

Order on Petition for rehearing with Suggestion for rehearing En Banc
(4th Cir. June 19, 1996) App. B

Joint Appendix-Fourth Circuit pp 963-964 App. C

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JIMMIE ROSS BLALOCK, *Defendant-Appellant.*	No. 95-5280
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. LEE ROY BLALOCK, JR., a/k/a Pete, *Defendant-Appellant.*	No. 95-5295

Appeal from the United States District Court
for the Middle District of North Carolina, at Greensboro.
William L. Osteen, Sr., District Judge.
(CR-94-141)

Argued: April 5, 1996

Decided: May 20, 1996

Before MURNAGHAN and LUTTIG, Circuit Judges, and
MICHAEL, Senior United States District Judge for the Western
District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

APPENDIX A

COUNSEL

ARGUED: Anthony Wayne Harrison, Jr., HARRISON, NORTH, COOKE & LANDRETH, Greensboro, North Carolina; Daniel Smith Johnson, Winston-Salem, North Carolina, for Appellants. David Bernard Smith, Assistant United States Attorney/Senior Litigation Counsel, Greensboro, North Carolina, for Appellee. **ON BRIEF:** Walter C. Holton, Jr., United States Attorney, Greensboro, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellants Jimmie Ross Blalock and Lee Roy Blalock, Jr., were convicted by a jury of conspiring to possess and distribute marijuana. On appeal, both Appellants have argued that the district court clearly erred when it calculated the amount of drugs attributable to them and when it enhanced their sentences for possession of a weapon. Lee Roy Blalock has further contended that the district court erred when it denied his motion for judgment of acquittal and when it held that the Double Jeopardy Clause did not bar the government's prosecution of him, and that the district court both clearly erred and abused its discretion when, pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence, it permitted testimony concerning an out-of-court statement made by one of the conspirators. Finding their contentions lacking merit, we affirm Appellants' convictions and sentences.

I.

On June 1, 1994, a federal grand jury returned an indictment charging Appellants with conspiring to possess and distribute more than 1,000 kilograms of marijuana in violation of 21 U.S.C.

§§ 841(b)(1)(A), 846 (Supp. 1996). Lee Roy Blalock filed a motion to dismiss the indictment as it applied to him, arguing that he had already been punished for his actions when he forfeited to the United States $45,512 and a 1990 Cadillac in civil forfeiture proceedings and that prosecution on the grounds stated in the indictment would therefore violate the Double Jeopardy Clause. The district court denied the motion, holding that Blalock was not being punished twice for the same offense: the civil forfeitures had occurred as a result of his alleged violation of money laundering statutes, rather than as a result of the drug offenses for which he had been indicted.

A jury trial commenced on October 3, 1994. The government presented evidence suggesting the existence of a conspiracy between Jimmie, Lee Roy, Robbie, and Adam Blalock, Dennis Gale, Pam Beauchamp, Eddie Kyle, and possibly others, to obtain marijuana from Mexico and elsewhere for local distribution. Witnesses called by the government indicated that, over a period of several years, hundreds of bales of marijuana were delivered to the conspirators and that the marijuana frequently arrived in trucks that had been fitted with secret compartments for just that purpose. On October 11, the jury returned guilty verdicts against both defendants. Jimmie Blalock and Lee Roy Blalock were subsequently sentenced to 200 months and 160 months in prison, respectively. The instant appeals followed.

II.

A.

On January 21, 1992, the United States initiated two civil forfeiture actions pursuant to 18 U.S.C. § 981(a)(1)(A) against property owned by Lee Roy Blalock: a 1990 Cadillac and $104,524 in United States currency. The verified complaints alleged that both the car and the currency were "property which was involved in and facilitated transactions, or which represent[ed] the gross receipts obtained directly or indirectly as a result of transactions, in violation of 18 U.S.C. §§ 1956(a)(1) and 1957, and property traceable to such property." Internal Revenue Service Special Agent Ted E. Warren filed the supporting affidavits, stating a belief that Blalock had been involved in the trafficking of large quantities of marijuana; that substantial amounts of currency had been acquired as a result of that activity; and

that a loaded weapon, marijuana, and more than $104,000 in currency had been found in Blalock's 1990 Cadillac after he was stopped for speeding. The parties later entered a settlement, under which the vehicle and $45,512 were forfeited to the United States and $59,012 was returned to Blalock. Blalock asked the district court to dismiss the subsequent criminal indictment, arguing that, in light of the civil forfeiture, his prosecution on the conspiracy charges violated the Double Jeopardy Clause of the Fifth Amendment.[1] The district court rejected that argument and refused to dismiss the indictment. We review the matter *de novo*. *Thomas v. Commissioner, I.R.S.*, 62 F.3d 97, 99 (4th Cir. 1995).

The general principles governing such double jeopardy claims are fairly well established. "[T]he Double Jeopardy Clause protects against . . . multiple punishments for the same offense." *United States v. Halper*, 490 U.S. 435, 440 (1989). The *Halper* Court observed that "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law," *id.* at 447-48, and that a civil or criminal "sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment"—namely, retribution or deterrence, *id.* at 448. To determine whether a civil sanction constitutes punishment, we must therefore determine whether the sanction may "fairly be characterized as remedial," or instead only serves the purposes of deterrence or retribution. *Id.* at 448-49. To determine whether a person is being punished twice *for the same offense*, we must apply the test announced in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), by asking "whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." *United States v. Dixon*, ___ U.S. ___, 113 S. Ct. 2849, 2856 (1993).

The civil forfeiture complaints in the instant case alleged that the property had been involved in violations of 18 U.S.C. §§ 1956(a)(1)(A)(i), (B)(i) and 1957, thereby triggering the govern-

[1]The Fifth Amendment states, in pertinent part, that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

ment's right to seek forfeiture pursuant to 18 U.S.C. § 981(a)(1)(A).[2] Section 1956(a)(1) provides:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or . . .
>
> (B)(i) knowing that the transaction is designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity . . .
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

§ 1956(a)(1) (Supp. 1996). Section 1957 makes it illegal for a person "knowingly [to] engage[ ] or attempt[ ] to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity." § 1957(a) (Supp. 1996).

Blalock's double jeopardy argument fails. Applying the *Blockburger* test, it is clear that he was not punished twice for the same offense. Section 1956 is a money-laundering statute (indeed, the section is titled "Laundering of monetary instruments"). To prove a violation of that statute, the government must show that

---

[2]Section 981(a)(1)(A) provides, in pertinent part, that "[a]ny property, real or personal, involved in a transaction or attempted transaction in violation of . . . section 1956 or 1957 of this title, or any property traceable to such property," is subject to forfeiture to the United States. § 981(a)(1)(A) (Supp. 1996).

> (1) the defendant conducted or attempted to conduct a financial transaction; (2) the property involved the proceeds of specified unlawful activity; (3) the defendant knew that the property involved represented the proceeds of some form of unlawful activity; (4) the defendant engaged in the financial transaction with the intent to promote the carrying on of specified unlawful activity; or (5) while knowing that the transaction was designed in whole or in part, to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of the unlawful activity.

United States v. Heaps, 39 F.3d 479, 483 (4th Cir. 1994). To prove a violation of section 1957, the government must show "that the funds or monetary instruments used in a transaction either themselves constitute, or are derived from, the proceeds of specified criminal activity." *United States v. Moore*, 27 F.3d 969, 976 (4th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 459 (1994). To support its section 846 conspiracy charge, however, the government was required to show that Blalock knew of a conspiracy to distribute, or to possess with intent to distribute, at least 1,000 kilograms of marijuana and that he voluntarily joined that conspiracy. *United States v. Clark*, 928 F.2d 639, 641-42 (4th Cir. 1991); 21 U.S.C. §§ 841, 846 (1981 & Supp. 1996) (discussed *infra*). The civil and criminal charges clearly are composed of one or more different elements. For example, while in the civil forfeiture proceedings the government would have been required to prove that Blalock had engaged or attempted to engage in a financial transaction, no such proof was required to sustain the conspiracy charge. Similarly, while in the criminal proceedings the government was required to prove that the conspiracy involved at least 1,000 kilograms of marijuana, no such proof would have been required in the forfeiture proceedings. It does not matter whether, with respect to several other elements, there was an "overlap of proof" in the two actions. *United States v. Felix*, 503 U.S. 378, 386 (1992). Because the civil and criminal proceedings involved one or more different elements of proof, the Double Jeopardy Clause afforded Blalock no protection from prosecution for the crimes of which he was ultimately convicted.[3]

---

[3]We should further note that, to the extent that the forfeited car and currency were instrumentalities of Blalock's unlawful drug activity, the

B.

After the government rested its case, Lee Roy Blalock moved for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Under Rule 29, a trial court is required to enter judgment of acquittal "of one or more offenses charged in the indictment or information . . . if the evidence is insufficient to sustain a conviction of such offense or offenses." Fed. R. Crim. P. 29(a). The district court denied the motion. Blalock believes the motion should have been granted. "In reviewing the denial of a motion for acquittal, we must determine whether, taking the evidence and all inferences therefrom in the light most favorable to the government, there is substantial evidence which supports a determination of guilt beyond a reasonable doubt." *United States v. Whittington*, 26 F.3d 456, 464 (4th Cir. 1994).

Blalock was charged with conspiring, in violation of 21 U.S.C. §§ 841(b)(1)(A), 846, to possess and distribute more than 1,000 kilograms of marijuana in violation of 21 U.S.C. § 841(a)(1). Section 841(a)(1) makes it illegal for a person "knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Section 841(b)(1)(A) (Supp. 1996) requires a sentence of not less than ten years for individuals whose violation of section 841(a)(1) involves 1,000 kilograms or more of marijuana. Section 846 (Supp. 1996) states that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

"The essential elements of a § 846 conspiracy are (1) an agreement between two or more persons to undertake conduct that would violate

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forfeiture of those items did not constitute punishment for double jeopardy purposes. *See United States v. Cullen*, 979 F.2d 992, 994-95 (4th Cir. 1992) (stating that "[t]he removal of an instrument of [an] offense is not primarily an act of punishment" but instead protects the larger community from the threat of ongoing criminal activity, and that, consequently, "the Double Jeopardy Clause does not apply to civil forfeitures where the property itself has been an instrument of criminal activity").

the laws of the United States relating to controlled substances and (2) the defendant's wilful joinder in that agreement." *Clark*, 928 F.2d at 641-42. Once the government has demonstrated that a conspiracy existed, "the evidence need only establish a slight connection between the defendant and the conspiracy to support conviction." *United States v. Brooks*, 957 F.2d 1138, 1147 (4th Cir.), *cert. denied*, 505 U.S. 1228 (1992). Indeed, a defendant may properly be convicted of conspiracy even if he did not know his coconspirators or the details of the conspiracy: he need only have known of the conspiracy's purpose and have taken some action, however minor in the overall scheme of the conspiracy, to participate therein. *Id.*

We hold that the district court did not err when it denied Blalock's motion for acquittal. The government presented evidence indicating that, when bales of marijuana arrived, Pam Beauchamp—one of the conspirators who kept written records of the conspirators' activities—recorded the amount of marijuana delivered to Blalock using the initial "P," "Pete" being Lee Roy's nickname. Blalock was once seen stuffing cash into paper bags with Jimmie, Adam, and Robbie Blalock. On at least one occasion, Blalock relayed instructions to Eddie Kyle concerning the routing of marijuana shipments. At Blalock's request, Kyle dug up a buried vault containing numerous packages of money. Blalock also asked Kyle whether he could install secret compartments in a vehicle; members of the conspiracy frequently used secret compartments to carry money and drugs. Such evidence was more than sufficient to establish the requisite connection between Blalock and the conspiracy.

C.

Over Lee Roy Blalock's objection, Eddie Kyle was permitted to testify that Pam Beauchamp had told him that, in the records she kept concerning the receipt and distribution of marijuana, the letter "P" stood for "Pete," Lee Roy's nickname. Blalock has contended that the testimony was inadmissible hearsay and that he was unduly prejudiced by its admission.

Rule 801(d)(2)(E) of the Federal Rules of Evidence excludes from the hearsay rule statements made "by a coconspirator of a party during the course and in furtherance of the conspiracy." To find that what

would otherwise be inadmissible hearsay is admissible under that rule, a district court must find "(1) that there was a conspiracy involving the declarant and the party against whom admission of the evidence is sought and (2) that the statements at issue were made during the course of and in furtherance of that conspiracy." *United States v. Blevins*, 960 F.2d 1252, 1255 (4th Cir. 1992). The district court's findings of fact in that regard are reviewed for clear error; its decision to admit the statement as evidence is reviewed for an abuse of discretion. *Id.* "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

Blalock has not argued that Beauchamp was not one of the conspirators; the evidence presented at Appellants' trial suggested that she clearly was. Instead, Blalock has argued that Beauchamp's explanation of the records to Kyle was not given "during the course and in furtherance of the conspiracy." We conclude otherwise. The fact that the records were being kept at the time the statement was made indicates that the conspiracy was then underway; we therefore find that the district court did not clearly err when it found that the statement was made "during the [conspiracy's] course." Because we believe that one permissible view of Beauchamp's statement is that she deemed it useful to the conspiracy to educate Kyle, an occasional participant therein, concerning the conspirators' practices and record-keeping system, we similarly find no clear error in the district court's finding that the statement was made "in furtherance of the conspiracy." Given the obvious relevance of the statement to the question of Blalock's guilt, we further hold that it was not an abuse of discretion to admit the statement as evidence.

D.

The district court concluded that, for sentencing purposes, 17,702.63 pounds (8,029.91 kilograms) of marijuana were attributable to Jimmie Blalock, and 16,740.63 pounds (7,593.55 kilograms) were attributable to Lee Roy Blalock. Both Appellants have argued that the district court erred when it made those calculations.

We review the findings of fact made by the district court during sentencing only for clear error. *United States v. Vinson*, 886 F.2d 740,

742 (4th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990). When calculating the amount of drugs attributable to a person convicted of conspiracy, the district court may consider not only the conduct of the defendant himself, but also the reasonably foreseeable conduct of the defendant's coconspirators. U.S.S.G. § 1B1.3(a)(1)(B).

At trial, the government presented testimony indicating that, prior to the government's raid of the conspirators' headquarters on February 1, 1990, between 36 and 48 shipments of marijuana arrived there, with between 450 and 750 pounds arriving in each shipment. The district court took the lower end of those two ranges, multiplied 36 by 450 and determined that 16,200 pounds (approximately 7,350 kilograms) of marijuana were attributable to each Appellant. Other, smaller amounts were attributed to one or both of them as well. Having carefully reviewed the record, we find that the district court did not clearly err when it made those calculations.

E.

Section 2D1.1(b)(1) of the Sentencing Guidelines provides that, "[i]f a dangerous weapon (including a firearm) was possessed" during the commission of a drug offense, then the defendant's base offense level should be enhanced by two. The Application Notes elaborate upon that provision:

> The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. *The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.* For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

App. Note 3 (emphasis added). Both Appellants have contended that the district court clearly erred when it enhanced their respective sentences pursuant to that provision.

During the sentencing hearing, both men argued that the evidence did not indicate that they had ever used or carried weapons while car-

rying on the activities for which they had been convicted. The district court nevertheless held that enhancement was appropriate:

> I will find that there were some 32 guns, seven of which were loaded,[4] inside the house at Fraternity [Church] Road [the location where many of the drug shipments were received and parcelled out for distribution]; that each of the two defendants were in and out of the house, engaged in the activities at the house of counting money, which the Court has already found to be, from this evidence, in furtherance of the conspiracy. And it occurs to the Court that I believe there were surveillance lights and cameras around this house.
>
> The activities of drugs themselves would seem to cause one to think that it was foreseeable that guns could be used, when you're talking about hiding in secret compartments and loads of marijuana. When you're talking about hiding sums of money in the hundreds or $200,000, . . . it would not be out of the range of foreseeability to find that a gun was used in connection with the activities. And I will so find that [enhancement] is appropriate as to Jimmie Blalock and Lee Roy Blalock.

We may reject the district court's factual determinations in this regard only if they are clearly erroneous. *Brooks*, 957 F.2d at 1148.

Because we do not believe it was "clearly improbable" that the weapons found at the conspirators' headquarters would be used in furtherance of the conspiracy, we hold that the district court did not commit clear error. The presence of thirty-two guns—a number of which were loaded—on the property where many of Appellants' drug activities occurred is entirely different from the unloaded hunting rifle to which the Application Notes make reference. We accordingly reject Appellants' arguments to the contrary.

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[4]The Presentence Investigation Reports indicated that thirteen of the guns were loaded.

III.

For the foregoing reasons, we uphold Appellants' convictions and sentences.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 95-5280
CR-94-141

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JIMMIE ROSS BLALOCK

Defendant - Appellant

No. 95-5295
CR-94-141

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

LEE ROY BLALOCK, JR., a/k/a Pete

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing in Banc

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The appellants' petition for rehearing and suggestion for

rehearing in banc were submitted to this court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petitioner for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
Clerk

* * *

There is also evidence, though it is not as complete as to Pete, of Leroy Blalock having participated not only in being present when the unloading was taking place of marijuana, but also that marijuana was sold at his place. He was present when money was turned over to Jimmie Blalock. The money at least disappeared from the presence of others, while Jimmie and Leroy were present. There is evidence that he was heavily involved in the activities, moving of two tractor-trailer loads; two tractor-trailers containing not only marijuana, but containing substantial amounts of funds. All of which leads the Court to believe that there is evidence of great participation on the part of Jimmie Blalock in the conspiracy mentioned.

The evidence as to Leroy Blalock is not so overwhelming, but by the same token there is evidence that he participated at many various stages. He is not isolated in a stage. It's from the time that the monies exchanged hands for the purchase of marijuana. There is evidence that he was present for the discussion of changing the configuration of the tractor-trailers. There is evidence that he was present when sales were made, when monies were delivered. There is evidence that he somewhat directed the activities of the movement of the tractor-trailers when the house of cards was coming down.

The Court does not find that there is anywhere in here, included any agreement, that we will import a certain amount of marijuana, or that anybody knew the exact amount of marijuana was being imported, how often the trips were going, and how much compartment was set aside for the use of transporting marijuana.

For that reason, the Court finds that Jimmie Blalock should have, in his calculation, each of the calculations which I have asked Mrs. Burton to make and which she has given to you as 17,702.63 and converted into kilos, 8,029 point something. I didn't get the point.

* * *

APPENDIX C